

NO. 45944-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RICHARD SCOTT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PACIFIC COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Richard Scott entered an *Alford* plea¹ to third degree rape of a child, but always maintained his innocence. With due diligence following the conviction, Mr. Scott obtained three recanting statements from the alleged victim, D.H. Mr. Scott also obtained declarations corroborating the newly discovered evidence that D.H. was not in Mr. Scott's presence while D.H. was under 16 years of age. Because the newly-discovered evidence is reliable and because without D.H.'s allegations against Mr. Scott there is insufficient factual basis for Mr. Scott's plea, the Court should reverse the trial court and vacate Mr. Scott's conviction.

B. ASSIGNMENTS OF ERROR

1. The trial court's determination that the witness declarations supporting Mr. Scott's motion are not credible is incorrect and not supported by substantial evidence. CP 311.²

2. Finding of fact 3 is not supported by substantial evidence. CP 317.³

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

² A copy of the trial court's Memorandum Decision, available at CP 311-12, is attached as Appendix A.

3. Finding of fact 5 is not supported by substantial evidence.

CP 317-18.

4. Finding of fact 9 is not supported by substantial evidence.

CP 320-22.

5. Finding of fact 10 is not supported by substantial evidence.

CP 322-23.

6. Finding of fact 11 is not supported by substantial evidence.

CP 323.

7. The trial court erred in entering conclusion of law 4. CP 325.

8. The trial court erred in entering conclusion of law 5. CP 325.

9. The trial court erred in denying Mr. Scott's motion to vacate his conviction. CP 311.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should this Court review the record de novo because it consists almost entirely of written material?

2. Are the trial court's findings supported by substantial evidence?

³ A copy of the Findings of Fact, Conclusions of Law, and Order Supporting the Court's Memorandum Decision Dated February 11, 2014, available at CP 316-26, is attached as Appendix B.

3. Should Mr. Scott's motion to vacate his conviction be granted because the statements forming the factual basis for his *Alford* plea have been credibly recanted?

D. STATEMENT OF THE CASE

In May 2001, the State charged Mr. Scott with rape of a child in the third degree, naming D.H. as the alleged victim, and reciting the charging period of February to March 2001, just prior to D.H.'s 16th birthday. CP 5. Probable cause was based primarily upon D.H.'s statement to law enforcement and Child Protective Services (CPS), which is reported in the probable cause statement but not otherwise presented or directly quoted. CP 1-4. Connie DuFour also reported that she witnessed Mr. Scott engaged in anal sex with D.H. CP 2-3. Mr. Scott was convicted of rape in the third degree based on an *Alford* plea. CP 12-27; *see* CP 30-43 (agreed amended judgment).

In April 2006, Mr. Scott moved the trial court to vacate his conviction based on a recent recantation by D.H. CP __ (Sub #42).⁴ The trial court first denied Mr. Scott's motion as untimely. CP __ (Sub #134). This Court reversed and remanded for an evidentiary hearing. CP 44-62. On remand, the trial court denied the motion as successive.

⁴ A supplemental designation of clerk's papers has been filed requesting transmission of the documents designated herein by subfolder number.

CP ___ (Sub #339). But because the first motion was not decided on the merits, this Court again reversed ordering the trial court to conduct an evidentiary hearing to determine the credibility of Mr. Scott's evidence and, if credible, whether the evidence requires reversal of the conviction. CP 72-83.

At the November 20, 2013 evidentiary hearing, the court received documentary evidence from both sides. Exhibits 1 and 2; 11/1/13 RP 19-21; CP 318-20. Mr. Scott submitted a 2010 declaration from D.H. that affirms D.H. resided in Oregon until his 16th birthday in 2001, returning to Pacific County, Washington only after he was 16 years old. Exhibit 1 at #1. Declarations from Skylar Haynes, Marcus Haynes, Daniel Haynes, and Ralph Landeros each confirm the timing of D.H.'s return to Pacific County. Exhibit 1 at #2-5. Mr. Scott also submitted the transcript from a 2007 interview with Connie DuFour where Ms. DuFour attests she walked in on Mr. Scott having sex with D.H. days before Mr. Scott was arrested. Exhibit 1 at #7 (p.12). This evidence calls into question Ms. DuFour's May 2001 statement that she walked in on Mr. Scott in February or March 2001 because Mr. Scott was not arrested until May of that year. Exhibit 1 at #6, 8. Mr. Scott

also testified that he did not have sex with D.H. until after D.H. was 16 years old. 11/20/13 RP 14-20.

The State submitted its own additional documentary evidence, mostly from around the time of the charge. Exhibit 2. The trial court found Mr. Scott's evidence not credible and denied the motion to vacate. CP 311-12. Months later, the court entered the findings and conclusions proposed by the State. CP 316-26; 4/14/14 RP 2-3.

E. ARGUMENT

This Court should reverse the denial of Mr. Scott's motion to vacate his conviction.

1. Because Mr. Scott's motion was based on documentary evidence, this Court should review the issue under the de novo standard.

Appellate courts generally grant deference to a trial court's findings of fact on a motion to vacate. *E.g.*, *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996); *State v. Ieng*, 87 Wn. App. 873, 877, 942 P.2d 1091 (1997). Issues of law relating to a motion to vacate are reviewed de novo. *Macon*, 128 Wn.2d at 799.

It is appropriate to defer to a trial court's findings in the typical motion to vacate where the trial court determines credibility based on live testimony at the original trial, at the new trial hearing, or at both. *See Macon*, 128 Wn.2d at 787-99 (discussing at length the live

testimony at trial and recantation hearing over which trial judge presided); *Ieng*, 87 Wn. App. at 881 (trial court reviews trial testimony and testimony at hearing on new trial motion in determining credibility of appellant's witness for purposes of deciding new trial motion). In these typical cases, the trial court is in a better position to determine credibility because it has the witnesses before it and can observe them, their nonverbal conduct, and their demeanor. *State v. Floyd*, 178 Wn. App. 402, 316 P.3d 1091 (2013); *State v. Nava*, 177 Wn. App. 272, 297, 311 P.3d 83 (2013); *see State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012) (trial court's determination on challenge of juror for cause is entitled to deference because trial court is able "to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial").

The same reasoning does not apply here. "[W]here the record both at trial and on appeal consists entirely of written . . . material . . . and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses . . . then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo." *State v.*

Smith, 75 Wn.2d 715, 718, 453 P.2d 832 (1969). Where the evidence below is documentary, this Court is entitled to make its own examination of the record. *Id.* at 719.

Here the evidence is entirely by affidavit. Mr. Scott entered an *Alford* plea. Thus his conviction is not based upon live witness testimony, but upon documentary evidence. Moreover, at the evidentiary hearing on Mr. Scott's motion to vacate, the parties agreed the evidence would be presented by affidavit. Except for Mr. Scott's own testimony, the evidence at the hearing was entirely documentary. *See* Exhibits 1 and 2; CP 18-20 (listing admitted evidence). This Court is in as good a position as the trial court to review the documentary evidence and assess credibility. On review, this Court is "not bound by disputed findings of the trial court to the same extent and in the same manner as where the trial court's findings rest upon the oral testimony of witnesses." *Smith*, 75 Wn.2d at 719 (quoting *Carlson v. City of Bellevue*, 73 Wn.2d 40, 435 P.2d 957 (1968)). The Court should review the evidence and apply the law de novo.

2. To the extent the trial court's findings of fact are relevant, several should be stricken as without adequate support.

If the Court reviews the trial court's findings of fact, several should be stricken because they are not supported by substantial evidence.

First, finding of fact 3 is not supported by substantial evidence.

There, the trial court found,

Since 2009, the court has appointed five different lawyers to represent Mr. Scott in Superior Court. After the last directive from the Court of Appeals in 2012, the timing of the reference hearing has been delayed because Mr. Scott has been unhappy with his court-appointed counsel and has sought to discharge them. Also, Mr. Scott's latest defense counsel experienced difficulty in locating purported key witnesses.

CP 317. At the outset, this subject was not in the record before the trial court at the evidentiary hearing and is irrelevant to the issue before that court. The general record below, however, shows that at the first hearing on remand from the Court of Appeals, defense counsel made clear he needed to confer with Mr. Scott and may need an investigator to prepare the evidence for the remanded hearing. 1/25/13 RP 2-3. An investigator was, in fact, necessary and authorized. *See* CP ____ (Sub 421 and 420). Time was spent gathering evidence and looking for witnesses. *See* 11/1/13 RP 15-16. Mr. Scott also sought to exercise his

right to proceed pro se, which motion was denied without proper inquiry and that took three months to be resolved. 8/23/13 RP 3-18; 11/1/13 RP 2-11. The record does not support the stated bases for the delay between mandate and a hearing.

Finding of fact 5 also is not supported by substantial evidence. CP 317-18. Again this finding addresses issues irrelevant to the court's decision on the motion to vacate, and outside the record for that hearing. Further, there is no support for the assertion that the State agreed to allow documentary evidence because it did not want to further delay the hearing. CP 318. At a hearing on November 1, 2013, the State asserted that its concern with Mr. Scott's presentation of documentary evidence centered on its own ability to present alternative documents. 11/1/13 RP 17-18. The State made no argument or comment about delay. *See* 11/1/13 RP 12-13 (recognizing prior agreement to go beyond rules of evidence). Moreover, it was apparent at this hearing that the State also was not prepared to proceed with the evidentiary hearing as it remained in the process of seeking discovery and developing its case. 11/1/13 RP 11-12. Consequently, the finding is also not supported to the extent it finds "the State was not

responsible for the delay is [sic] scheduling the reference hearing.” CP 318.

Additionally, the lengthy finding of fact 9 is not supported by substantial evidence. CP 320-22. This finding claims that D.H.’s 2006 and 2007 statements are not credible because “they do not contain the level of detail that is present in the statements that he provided . . . in 2001.” CP 321. Contrary to the finding, D.H.’s 2006 declaration details his arrest and incarceration in 2001. Exhibit 2 at Exhibit 6. It also details D.H.’s contacts with Mr. Scott. *Id.*; *see also* Exhibit 2 at Exhibit 7 (transcript of 2006 interview with D.H.). D.H.’s 2007 interview also discusses extensively the nature of Mr. Scott’s work, Mr. Scott’s relationship with D.H.’s parents, D.H.’s living arrangements, and D.H.’s receipt and subsequent loss of Social Security. Exhibit 2 at Exhibit 8. Notably, this finding does not refer at all to D.H.’s 2010 declaration. *See* CP 320-22. In that declaration D.H. again, consistent with his 2006 and 2007 statements, affirms he was residing in Ontario, Oregon prior to April 2001. Exhibit 1 at #1. This declaration also contains extensive details about D.H.’s family visiting him in April 2001, their car troubles, and their eventual trip to Long Beach, Washington. *Id.*

Finding 9 is also unsupported to the extent it jumps to the conclusion that D.H. “essentially claims that the police did not accurately record his statements” and finding D.H.’s recantations not credible because “the CPS worker and the Long Beach Police had no reason to make up allegations or falsify their reports.” CP 321-22. To believe D.H.’s recantation in 2006, 2007 and 2010 does not require finding CPS and the police lied. Rather, D.H.’s recantation most naturally implies that D.H. falsified information in 2001. D.H.’s 2007 interview statements and 2010 declaration are also consistent with regard to D.H.’s absence from Long Beach during the charging period and return to the area only after he turned 16 years old. Exhibit 2 at Exhibit 8; Exhibit 1 at #1.

Finding of fact 10 also is not supported by substantial evidence. CP 322-23. The finding claims the 2010 declarations submitted by Mr. Scott “do not specifically indicate where [D.H.] was residing during the months of February and March 2001.” CP 322. But Skylar Haynes’s declaration states D.H. was “residing in Ontario, Oregon.” Exhibit 1 at #2. Marcus and Daniel Haynes’s use the same word choice, “residing.” Exhibit 1 at #3, 4. The use of the word “residing” plainly implies D.H. had been in Ontario, Oregon for “a considerable time” or

“permanently.” See www.dictionary.com (last visited Aug. 22, 2014).

In this finding, the trial court calls these declarations “inherently unreliable” as they “do not contain sufficient ‘background’ information to make them credible” and “the Court has no way to assess the reliability of these statements.” CP 323. However, each declaration provides details and those details are corroborated by the other 2010 declarations. This corroboration establishes credibility.

For the reasons set forth above and in section three below, finding of fact 11, that the “post-conviction evidence is not credible by any evidentiary standard” is not supported by substantial evidence. CP 323.

3. This Court should vacate Mr. Scott’s conviction because D.H.’s recantation is material evidence discovered with diligence only after the plea and it eliminates the factual basis for the *Alford* plea.

This Court should review the evidence de novo as set forth in section one. Alternatively, if the Court reviews the trial court’s factual findings, findings 3, 5, 9, 10 and 11 should be stricken because they are not supported by substantial evidence as set forth in section two. Both paths lead to the same result, the Court should find the post-conviction evidence credible and, in light of the evidence, Mr. Scott’s motion to

vacate the conviction should be granted because the third degree rape conviction cannot stand.

Recantation of evidence forming the basis of a conviction is newly-discovered evidence under Criminal Rule 7.8(b)(2) based upon which a court should grant relief from judgment. CrR 7.8(b)(2); *Ieng*, 87 Wn. App. at 877. To merit vacation of the conviction, “a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). If the now-recanted testimony is all that supports a conviction, that conviction must be reversed upon defendant’s motion to vacate. *In re Pers. Restraint of Clements*, 125 Wn. App. 634, 641, 106 P.3d 244 (2005); *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108 (1995) (citing *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974), *overruled on other grounds by Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975); *State v. York*, 41 Wn. App. 538, 543-44, 704 P.2d 1252 (1985)).

In determining reliability of a post-conviction recantation, courts ignore evidence that corroborates the initial testimony and regard

only the recantation and post-conviction evidence. *Macon*, 128 Wn.2d at 804; *Ieng*, 87 Wn. App. at 880. This Court should hold D.H.'s 2006 and 2007 recantations are reliable and his 2010 declaration is credible as well. The statements in all three documents consistently deny that Mr. Scott and D.H. had any sexual relationship during the charging period of February and March 2001. Each statement provides sufficient detail regarding D.H.'s whereabouts, his relationship with Mr. Scott and, with regard to the 2006 and 2007 interviews, Mr. Scott's business. Moreover, D.H.'s 2010 declaration is corroborated by the additional declarations presented by Mr. Scott.

Finding the evidence reliable necessarily leads to the conviction being vacated. Rape of a child in the third degree requires a victim less than 16 years old. RCW 9A.44.079(1). Because Mr. Scott entered an *Alford* plea, the court must have an independent factual basis for the plea. An *Alford* plea does not provide a basis in itself. *D.T.M.*, 78 Wn. App. at 220. D.H.'s 2001 statement that he had sexual relations with Mr. Scott prior to his 16th birthday initially constituted that independent factual basis for acceptance of the plea to third degree rape. But D.H.'s 2010 declaration, his 2006 and 2007 recantations and the corroborating declarations remove entirely that factual basis. *See* Exhibit 1. Mr.

Scott was convicted based solely on the statements of a now-recanting witness.⁵ It is an abuse of discretion to deny his motion to vacate.

Clements, 125 Wn. App. at 641; *D.T.M.*, 78 Wn. App. at 220.

F. CONCLUSION

Because the evidence produced in Mr. Scott's post-trial motion demonstrates his conviction is without support, this Court should reverse the trial court and vacate Mr. Scott's conviction.

DATED this 26th day of August, 2014.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

⁵ Connie DuFour's statements, the only other evidence supporting Mr. Scott's plea, are likewise called into question by her 2007 interview in which she testified she encountered Mr. Scott and D.H. engaged in sexual intercourse days before Mr. Scott was arrested in early May 2001. Exhibit 1 at #5-8. D.H. turned 16 years old on April 12, 2001. Exhibit 1 at #1. Accordingly, Ms. DuFour did not witness Mr. Scott having sex with a 15-year-old D.H.

APPENDIX A

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VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PACIFIC

STATE OF WASHINGTON,)	
)	
Appellant,)	NO. 01-1-00082-7
vs.)	
)	
RICHARD ROY SCOTT,)	MEMORANDUM DECISION
)	
Respondent.)	
_____)	

The Court heard argument on November 20, 2013. Mr. Scott was represented by Mr. David Arcuri and the State was represented by Dr. David Burke. The Court has considered the well-drafted materials and counsels' oral arguments. The Court now decides (1) Whether Mr. Scott's post-conviction evidence is credible?

1. The post-conviction declarations by the several witnesses, including the victim, are considered not credible. Stating something in a declaration, does not itself, make those declarations credible. The State produced conflicting statements which either refuted, in part or in whole, such defense declarations. Further, the State produced facts that, considered as a whole, bring this court to its conclusion that defendant's post-conviction evidence is not credible by any evidentiary standard.
2. Therefore, defendant's motion to vacate his conviction is denied.

3. The State shall [Mr. Scott may] present Findings and Conclusions, if required, consistent with this decision and note same for Court's consideration.

Dated: February 11, 2014



Judge Michael J. Sullivan

APPENDIX B

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VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

BY DEPUTY

**IN THE SUPERIOR DISTRICT COURT FOR THE STATE OF WASHINGTON
FOR PACIFIC COUNTY**

STATE OF WASHINGTON,

Plaintiff,

vs.

RICHARD ROY SCOTT,

Defendant.

Case No 01-1-00082-7

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER SUPPORTING THE COURT'S
MEMORANDUM DECISION DATED
FEBRUARY 11, 2014

After fully considering the evidence presented at the reference hearing on November 20, 2013, the arguments of counsel, and the written briefs of the parties, the Court enters the following Findings of Fact, Conclusions of Law, and Order to support the Court's memorandum decision that was issued on February 11, 2014:

FINDINGS OF FACT

1. The Pacific County Superior Court conducted a reference hearing on November 20, 2013, in which the defendant, Richard Roy Scott, was allowed to present evidence to challenge his 2001 conviction for Rape of a Child in the Third Degree. Mr. Scott sought to withdraw his guilty plea and urged the court to vacate his 2001 conviction.
2. This reference hearing was first ordered by the Court of Appeals in 2009. State v.

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1 Scott, 150 Wash App. 281, 207 P.3d 495 (2009). In 2010, The Pacific County
2 Superior Court ruled that Mr. Scott was "playing with the court" and that by his
3 actions justified a denial of the reference hearing that the Court of Appeals had
4 ordered. Subsequently, the Court of Appeals ruled that because the Superior Court
5 had not considered the merits of Mr. Scott's argument to withdraw his guilty plea, Mr.
6 Scott was still entitled to a reference hearing. State v. Scott, (August 9, 2012)
7 (unpublished opinion).
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11 3. Since 2009, the court has appointed five different lawyers to represent Mr. Scott in
12 Superior Court. After the last directive from the Court of Appeals in 2012, the timing
13 of the reference hearing has been delayed because Mr. Scott has been unhappy with
14 his court-appointed counsel and has sought to discharge them. Also, Mr. Scott's
15 latest defense counsel experienced difficulty in locating purported key witnesses.
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18 4. Mr. Scott's latest defense attorney, David Arcuri, informed the Court that he was
19 unable to locate key witnesses, even though a diligent search was conducted. Several
20 of these purported key witnesses live out of the State and their whereabouts are
21 unknown.
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24 5. Mr. Scott, through his attorney, David Arcuri, indicated to the Court that he wanted
25 the reference hearing to occur based solely on existing written materials. At the
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1 hearing on November 20, 2013, the defense stated that it was not seeking to
2 introduce any live testimony other than the testimony of Mr. Scott. The State agreed
3 to allow documentary materials to be admitted into evidence even though these
4 materials could be excluded under the Rules of Evidence. The State agreed to allow
5 Mr. Scott to introduce documentary materials into evidence at the reference hearing,
6 because the State did not want to further delay the reference hearing which had been
7 placed on hold for far too long. The Court finds that the State was not responsible for
8 the delay in scheduling the reference hearing.
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13 6. Given the agreement of parties, the Court conducted the reference hearing on
14 November 20, 2013, based on documentary evidence supplied by the parties and the
15 brief testimony of Mr. Scott. The defendant submitted the following items for the
16 Court's consideration:
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- 19 a. Declaration of Dustin Haynes dated August 12, 2010.
- 20 b. Declaration of Skylar Haynes dated October 21, 2010.
- 21 c. Declaration of Marcus Haynes dated September 28, 2010.
- 22 d. Declaration of Daniel Haynes dated August 6, 2010.
- 23 e. Declaration of Ralph Landeros dated December 9, 2010.
- 24 f. Statement of Connie Dufour dated May 9, 2001.
- 25 g. Transcription of the interview of Connie Dufour by Chuck Pardee which occurred
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1 on March 18, 2007.

2 h. Report in The Chinook Observer dated May 16, 2001, pertaining to the arrest of
3 the defendant.
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5 i. Defendant's Motion to Vacate Conviction filed on August 18, 2010.
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8 7. The State submitted the following items for the Court's consideration at the reference
9 hearing on November 20, 2013:

10 a. The Plea Agreement State v. Scott dated May 25, 2001.

11 b. In re Detention of Scott, 150 Wash. App. 414, 208 P 3d 12 11 (2009).
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13 c. State v. Scott, 150 Wash. App. 281, 207 P. 3d 495 (2009).
14

15 d. State v. Scott, (August 8, 2009) (unpublished opinion).
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17 e. 2001 Long Beach Police report and witness statements.

18 f. Declaration of Dustin Haynes dated May 11, 2006.
19

20 g. Transcription of the interview of Dustin Haynes by Al Farr which occurred on May
21 11, 2006.

22 h. Transcription of the interview of Dustin Haynes by Doug Merino which occurred on
23 August 15, 2007.

24 i. Declaration of David J.W. Hackett, King County Senior Prosecuting Attorney, dated
25 June 9, 2006 and associated exhibits.

26 j. Presentence Investigation of Robert Bromps, Community Corrections Officer II,
27 dated June 27, 2001.
28

- 1 k. State of Montana v. Dustin Wayne Haynes, Montana First Judicial District Court,
2 Lewis and Clark County, No. CD 2003-215 (August 27, 2003).
3
4 l. State of Oregon v. Dustin W. Haynes, In the Circuit/District Court of the State of
5 Oregon for the County of Malheur, No. 03073974C (May 23, 2005) (Supplemental
6 Judgment). State of Oregon v. Dustin W. Haynes, In the Circuit/District Court of
7 the State of Oregon for the County of Malheur, No. 03073974C (March 1, 2014)
8 (General Judgment).
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10 m. Declaration of Dustin Haynes dated August 12, 2010.
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12 n. Declaration of Marcus Haynes dated September 28, 2010.
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14 o. Declaration of Daniel K. Haynes dated August 6, 2010.
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16 p. Declaration of Ralph Landeros dated December 9, 2010.
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18 q. Declaration of Zorah Sowa, Legal Assistant for the Pacific County Prosecutor's
19 Office, dated November 18, 2013.
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21 r. Transcription of the interview of Connie Dufour by Chuck Pardee which occurred
22 on March 18, 2007.
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26 8. The Court admitted the items listed in Findings of Fact Nos. 6 and 7 into evidence at
27 the beginning of the reference hearing on November 20, 2013.
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31 9. The defendant argued that he did not commit the crime of Rape of a Child in the
Third Degree because he had sexual relations with Dustin Haynes after Mr. Haynes

1 turned age 16. Therefore, according to the defendant, no crime occurred. The
2 defendant asserted that the statements made by Dustin Haynes in 2001, 2006, and
3 2007, were inconsistent and patently unreliable. In 2001, Dustin Haynes told a Child
4 Protective Service (CPS) worker and the Long Beach Police that he had sexual
5 relations with Mr. Scott on an ongoing basis during 2000 and the first part of 2001,
6 i.e., while he was still age 15. Dustin Haynes also indicated that he was coerced into
7 having sex with Mr. Scott. In 2006, Dustin Haynes stated that he was never forced to
8 have sex with Mr. Scott, that nothing happened between him and Mr. Scott, and that
9 Mr. Scott never made any sexual moves toward him. Likewise, in 2007 Dustin Haynes
10 asserted that he did not have a sexual relationship with Mr. Scott. While the later
11 statements of Dustin Haynes are not consistent with the information that he relayed
12 to the CPS worker and the Long Beach Police in 2001, these later statements also are
13 not consistent with the statements made by Mr. Scott. In particular, Mr. Scott
14 admitted to a Community Corrections Officer in 2001 that he engaged in sexual
15 relations with Dustin Haynes. Mr. Scott also admitted in a disposition in 2005 to
16 having sex with Dustin Haynes.

17 The Court finds that the later statements of Dustin Haynes are not credible because
18 they do not contain the level of detail that is present in the statements that he
19 provided to the CPS worker and the Long Beach Police in 2001. Moreover, Dustin
20 Haynes later statements do not assert that he told falsehoods in 2001. On the
21 contrary, Dustin Haynes essentially claims that the police did not accurately record his

1 statements. Due to the passage of time, the Court finds that the statements Dustin
2 Haynes made to the CPS worker and the Long Beach Police in 2001 are credible,
3 whereas the later statements are not believable. This factual assessment is
4 buttressed by the fact the CPS worker and the Long Beach Police had no reason to
5 make up allegations or falsify their reports. The later statements of Dustin Haynes
6 also are suspect and not credible because they do not comport with the assertions of
7 Mr. Scott that he had sexual relations with Dustin Haynes.
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11 10. The gravamen of this reference hearing thus turns on whether the assertion of Mr.
12 Scott is credible, the sexual relations that occurred between Mr. Scott and Dustin
13 Haynes took place after Dustin Haynes turned age 16 on April 16, 2001. Besides his
14 own testimony at the reference hearing which supported this assertion, Mr. Scott
15 pointed to the declarations of Skylar Haynes, Marcus Haynes, Daniel Haynes, and
16 Ralph Landeros in arguing that Dustin Haynes was not on the Long Beach Peninsula
17 during the time period listed in the information, viz., February and March of 2001. A
18 close inspection of those declarations shows that they only assert that Dustin Haynes
19 returned to the Long Beach Peninsula around the time he turned age 16. They do not
20 specifically indicate where Dustin Haynes was residing during the months of February
21 and March 2001. Further, the statement by Ralph Landeros which indicated that he
22 did not see Mr. Scott act in a sexually inappropriate manner is not helpful. Mr.
23 Landeros was not in a position to observe Mr. Scott at all times.
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1 More importantly, all of these declarations, which were written years after the events
2 in question, are inherently unreliable. These declarations do not contain sufficient
3 "background" information to make them credible. Specifically, the Court has no way
4 to assess the reliability of these statements, since the Court has little information
5 about the declarants, and the declarants were not subject to cross examination. In
6 short, stating something in a declaration does not in itself make the declaration
7 credible. Moreover, the contention of Mr. Scott is inconsistent with the statements
8 provided to the police by Dustin Haynes, Connie Dufour, and Johan Fernlund in 2001.
9 The initial statements of these witnesses confirm that Mr. Scott had sexual relations
10 with Dustin Haynes when he was age 15. While Ms. Dufour changed her statement in
11 2007, there is no reason to believe that a statement provided approximately six years
12 after the event in question is more trustworthy than the original statement. Since the
13 memory of individuals tends to fade over time, Ms. Dufour's statement should be
14 given little credence. Similarly, while the 2001 statement of Johan Fernlund is not
15 dispositive, it constitutes one more piece of evidence that the sexual relationship
16 between Mr. Scott and Dustin Haynes had been going on for a good deal of time.
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- 23 11. Taking all the evidence together, the defense has not presented sufficient factual
24 predicates to override the information that has previously been gathered by the State.
25 The defendant's post-conviction evidence is not credible by any evidentiary standard.
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1 12. Any Conclusion of Law which is deemed to be a Findings of Fact is hereby adopted as
2 such.

3 4 CONCLUSIONS OF LAW

5
6 1. The Court has jurisdiction over this case.

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9 2. Pursuant the Court of Appeals opinions in State v. Scott, 150 Wash. App. 281, 207
10 P. 3d 495 (2009) and State v. Scott, (August 9, 2012) (unpublished opinion), the
11 Pacific County Superior Court was ordered to conduct a reference hearing in this
12 case. The Superior Court has complied with this directive of the Court of Appeals.
13 The reference hearing conducted on November 20, 2013, gave Mr. Scott the
14 opportunity to challenge the validity of his 2001 conviction for Rape of a Child in
15 the Third Degree.
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19 3. Mr. Scott seeks to withdraw his guilty plea and requests under C.R.7.8(b) that the
20 Court vacate his conviction for Rape of a Child in the Third Degree. This request
21 constitutes a collateral attack on the judgment. In re Pers. Restraint of Becker,
22 143 Wash. 2d 491, 496, 20 P. 3d 409 (2001). In order to prevail on a collateral
23 attack (and more specifically on a CrR 7.8 motion to vacate), Mr. Scott has the
24 burden of establishing his factual contentions by a preponderance of evidence.
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27 State v. Holley, 75 Wash. App. 191, 200 n.4, 876 P. 2d 973 (1994); State v. Brune,
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29

1 45 Wash. App. 354, 363, 725 P. 2d 454 (1986); State v. Davis, 25 Wash. App.
2 134, 138, 605 P. 2d 358 (1980); and In re Pers. Restraint of Gentry, 137 Wash. 2d
3 378, 410, 972, P. 2d 1250 (1999).
4

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6 4. Based on the Findings of Fact listed above, Mr. Scott definitely has not met his
7 burden of proof.
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10 5. Therefore, Mr. Scott's motion to vacate his conviction should be denied.
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13 6. The Findings of Fact and Conclusions of Law are consistent with the Court's
14 Memorandum Decision that was filed on February 11, 2014.
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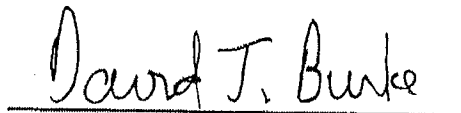
16
17 7. Any Finding of Fact which is deemed to be a Conclusion of Law is hereby adopted
18 as such.
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3 **ORDER**
4

5 The Court hereby denies the defendant's request to withdraw his guilty plea. The
6 Court also denies the defendant's motion to vacate his conviction for Rape of a
7 Child in the Third Degree.
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9
10 Dated this 4th day of April, 2014.
11

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13 
14 JUDGE

15 
16
17 DAVID J. BURKE WSBA#16163
18 Pacific County Prosecutor
19

20 Approved as to Form
21 
22 David Arcuri WSBA# 15517
23 Attorney for Defendant
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**


STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 45944-2-II
v.)	
)	
RICHARD SCOTT,)	
)	
APPELLANT.)	

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[X] RICHARD SCOTT	(X)	U.S. MAIL
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STEILACOOM, WA 98388		

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF AUGUST, 2014.

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